

Internal Revenue Service
memorandum

CC:TL-N-6788-87

TS:BHEARD

JUL 13 1987

date:

to: Regional Counsel, Southeast Region CC:SE
Attn: Robert Shilliday, Special Trial Attorney

from: Director, Tax Litigation Division CC:TL

subject: Review of Closing of TEFRA Partnership Cases:

[REDACTED]
[REDACTED], A Partner Other than the
Tax Matters Partner

We have reviewed your files with regard to the case entitled [REDACTED]. The following discussion supplements our prior oral advice that the decision documents in this case be withdrawn from the Court.

Issue

Whether it is appropriate to include issues such as additions to tax above the judge's signature in a decision document with respect to a TEFRA Partnership.

Conclusion

It is inappropriate to include issues such as additions to tax over which the Court has no jurisdiction above the judge's signature in a decision document with respect to a TEFRA Partnership. Such issues, however, may be the subject of the parties' stipulations found either below the judge's signature in the decision document itself, or in a separate stipulation document filed concurrently with the decision document.

The decision document, which is attached, sets forth the adjustments to partnership items per the settlement above the judge's signature. Thus, the decision document should be withdrawn and redrafted in conformity with this memorandum.

Facts

All "parties" to this action within the meaning of Tax Court Rule 246 have agreed to a stipulation of settlement with respect to the above partnership. A decision document was submitted to the Court which included additions to tax above the judge's signature.

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DISCUSSION

Section 6231(a)(3) defines "partnership item" as follows:

(3) Partnership item. - The term "partnership item" means, with respect to a partnership, any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner level.

Only partnership item adjustments are appropriately included in the FPAA. Since partnership items are limited to those items that are required to be taken into account under any provision of subtitle A, and since penalties and additions to tax are contained in subtitle F, it is inappropriate to include penalties or additions to the tax in an FPAA. See Maxwell v. Commissioner, 87 T.C. 783, 789-93(1986). The additions to tax are "affected items" which may be raised in a statutory notice of deficiency issued to individual partners after the conclusion of the partnership proceeding. See Maxwell, Id. at 792; and IRC § 6230(a)(2)(A)(i).

In the present case the Court has no jurisdiction to "redetermine" additions to tax which were erroneously set forth in the FPAA. Thus, setting forth additions to tax in the decision portion (above the judge's signature) of the decision document is inappropriate (although a statement above the line to the effect that the Court lacks jurisdiction over the asserted additions and additional interest would be proper).

The petitioner and respondent often stipulate to items which are relevant to the case, but over which the Court technically does not have jurisdiction (i.e. The parties traditionally agree to waive the restriction on assessment and collection of the tax until after the decision has become final). The stipulations may be found below the judge's signature as part of the decision document or they may be found in a separate stipulation document filed concurrently with the decision. It would be appropriate to state, as part of the decision itself, that the decision is being entered pursuant to the agreement of the parties which is set forth


in the accompanying stipulation. 1/ However, language "incorporating" the stipulation as part of the decision should be avoided due to the Court's lack of jurisdiction over the matter.

Treatment of the "affected items" in the stipulation is particularly appropriate where the issues were specifically raised in the notice and pleadings and were not officially the subject of a motion to strike. The stipulation (as well as the above - recommended language in the decision itself) makes clear that the purported issues have not been overlooked.

Should you have any further questions please feel free to contact Bill Heard at FTS 566-3361.

ROBERT P. RUWE

By:


R. ALAN LOCKYEAR
Senior Technician Reviewer
Tax Shelter Branch
Tax Litigation Division

Attachment:

Proposed decision document.

cc: Henry S. Schneiderman CC:TL
Arturo Estrada CC:TL

1/ Since there are other partners who are "parties" to the Court action pursuant to IRC §§ 6226(c)(1) and 6231(a)(2) but who are not "parties" within the meaning of Tax Court Rule 248, it is our position that the decision document should be submitted to the Court with a motion requesting the document be entered as the decision in this case. The motion should make clear that the service intends to assess the tax as to those non-participating parties based on the decision. It should be noted that a proposed Tax Court rule dealing with this situation is currently under review by the Rules Committee of the Court.